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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/756,622	01/12/2004	J. Brett Rolfson	MI22-2482	1635

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WELLS ST. JOHN P.S.  
601 W. FIRST AVENUE, SUITE 1300  
SPOKANE, WA 99201

EXAMINER

GOUDREAU, GEORGE A

ART UNIT	PAPER NUMBER
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1763

DATE MAILED: 06/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/756,622

Applicant(s)

ROLFSON, J. BRETT

Examiner

George A. Goudreau

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 11 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 43-58 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 43-58 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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1. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

2. Claims 43-50, and 55 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 6-12 of prior U.S. Patent No. 6,486,074. This is a double patenting rejection as applied in paragraph 3 of the previous office action.

3. Claims 43-58 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 11-25 of prior U.S. Patent No. 6,696,224. This is a double patenting rejection as applied in paragraph 4 of the previous office action.

4. Applicant's arguments filed 1-11-05' have been fully considered but they are not persuasive.

Applicant argues the following points regarding the examiner's rejection of their claimed subject matter.

-The presently claimed invention cannot be rejected under double patenting over the US patents, which are used to reject applicant's claims by the examiner. This is based upon the fact that the presently claimed invention does not claim identical subject matter or the same invention as those, which are claimed in the US patents cited by the examiner. For example, the presently claimed invention claims "...a peak implant concentration..." which is not mentioned in the claims of

either of the US patents cited by the examiner. Further, the pending US patent does not claim the presence of any "...opening bases..." in the masking layer as is claimed in the US patents which are cited by the examiner.

The examiner must disagree.

-It is inherent that a peak implant concentration occurs in the US patents, which were cited by the examiner in the same manner as that which is claimed by applicant in the present application. The claims in both issued patent refer to the spacing of the implanted region of the mask from the underlying layer which is to be etched, and which is on the substrate. Thus, all of applicant's claimed limitations are fully met in this regard by the claims in the US patent, which are cited by the examiner. Further, applicant has failed to distinguish their presently claimed invention from the inventions which are claimed in the issued US patents which are cited by the examiner.; and


-It is inherent that there are "...opening bases..." present in the invention which is claimed in the present application as well as in the claims of the issued US patents which are cited by the examiner. This is based upon the fact that the present application recites a process, which only partially etches the masking layer to leave behind structures, which may inherently be considered "...opening bases...". Thus, all of applicant's claimed limitations are fully met in this regard. Further, applicant has failed to distinguish their presently claimed invention from the inventions, which are claimed in the issued US patents, which are cited by the examiner.

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5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

6. Any inquiry concerning this communication should be directed to examiner George A. Goudreau at telephone number (571)-272-1434.

  
George A. Goudreau  
Primary Examiner  
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